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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BARBARA BOYLE,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Illinois Appellate Court, Fifth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Did exclusion of polygraph evidence, offered to corroborate petitioner's credibility as a witness, deny petitioner's sixth and due process rights to present a defense.

II.

After counsel failed to lay a foundation for the admission of this evidence, is certiorari review appropriate for this particular case.

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PRAYER

Respondent respectfully asks this Court to deny the petition for a writ of certiorari to review the judgment of the Illinois appellate court.

STATEMENT

Petitioner's statement (Pet. 3-5) is adequate for consideration of her petition.

REASONS FOR DENYING THE WRIT

I.

EXCLUSION OF POLYGRAPH EVIDENCE OFFERED TO CORROBORATE PETITIONER'S CREDIBILITY AS A WITNESS DID NOT DENY PETITIONER'S SIXTH AND DUE PROCESS RIGHTS TO PRESENT A DEFENSE.

Before trial, petitioner offered the results of a polygraph examination in order to bolster her credibility as a witness during the defense case. Illinois decisional law imposes a per se exclusion for polygraph evidence in criminal trials conducted in that state, however. *People v. Baynes*, 88 Ill. 2d 225, 430 N.E.2d 1070 (1981); *People v. Yarborough*, 93 Ill. 2d 421, 444 N.E.2d 493 (1982). Seeking certiorari review, petitioner now claims the Illinois rule invariably denies defendant's sixth and due process rights to present exculpatory evidence.

The states are free to exercise their sovereign prerogative to formulate rules of evidence and criminal procedure. *Patterson v. New York*, 432 U.S. 197, 201 (1977); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Spencer v. Texas*, 385 U.S. 554, 564 (1967). Because a criminal defendant has no absolute right to present exculpatory evidence, an accused must respect legitimate state procedural rules designed to assure reliability in the trial process. *Taylor v. Illinois*, ___ U.S. ___, 108 S. Ct. 646, 653, n.15, 98 L. Ed. 2d 798, 812, n.15 (1988), citing *Chambers*, 410 U.S. at 302. The Constitution imposes only a limited restraint upon state rules which are arbitrary or irrational. *Rock v. Arkansas*, ___ U.S. ___, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987), citing *Chambers*, 410 U.S. at 295. *Cf. Washington v. Texas*, 388 U.S. 14, 23 (1967) (reaching the same conclusion for the sixth amendment).

In the *Baynes* and *Yarborough* decisions, the Illinois Supreme Court has acted to remove untrustworthy evidence from a jury's consideration. Following the approach first recognized in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1973), the Illinois court has rejected evidence of questioned reliability which has not yet gained general acceptance in the scientific community. *Baynes*, 88 Ill. 2d at 240-44 (surveying cases from other jurisdictions). As a result, respondent firmly declines petitioner's off-hand invitation to "assume" the reliability of polygraph evidence in this or any other case. (Pet. 6).

Equally important, the Illinois courts have expressed concern that jurors will attach undue significance to this evidence. The jurors may regard polygraph evidence as substantive evidence which is conclusive of defendant's guilt or innocence. *Baynes*, 88 Ill. 2d at 244. Even when, as here, the evidence is offered to boost defendant's veracity as a witness, the jurors may place exclusive reliance on expert opinion, thereby abdicating their primary responsibility to resolve credibility matters as triers of fact. *Commonwealth v. Vitello*, 376 Mass. 426, 381 N.E.2d 582, 593 (1978) (petitioner's cited authority).

Finally, all courts have questioned the inherent reliability of the ex parte or "secret" examination involved in this case. Petitioner Boyle initially refused to take a polygraph examination. (Pet. App. A-18). A few days later, however, and "entirely without the knowledge of the State, [petitioner] took a polygraph examination conducted by a private examiner of her choice." (Pet. App. A-19). When the examinee knows that adverse test results need not be disclosed to the court or prosecutor, "this sense of security diminishes the fear of discovered deception, upon which an effective examination depends." *McMorris v. Israel*, 643 F.2d 458, 463 (7th Cir. 1981), *cert. denied*, 455

U.S. 967 (1982) (citations deleted). *See also United States v. Tucker*, 773 F.2d 136, 141 (7th Cir.), *cert. denied*, ____ U.S. ____, 106 S. Ct. 3337, 92 L. Ed. 2d 742 (1985); *United States v. Feldman*, 711 F.2d 758, 767 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983) (both affirming an exercise of trial court discretion to exclude unreliable evidence of a test performed without a stipulation); and *United States v. Dorfman*, 532 F. Supp. 1118, 1136 (N. D. Ill. 1981) (citing additional cases, law review articles, and scientific literature). *Cf. Commonwealth v. A Juvenile*, 365 Mass. 421, 313 N.E.2d 120, 126 (1974) (petitioner's cited authority, noting that a stipulation will motivate defendant to seek a test from a qualified examiner under proper testing conditions).

To urge a due process violation, petitioner seeks to bring her case within the shadow cast by *Rock v. Arkansas*. Although respondent does not wish to throw stones at *Rock*, respondent nevertheless submits three reasons for which *Rock* cannot control the disposition of this case.

In the *Rock* proceedings, the state's rejection of hypnotically refreshed evidence operated to preclude nearly all of defendant's own exculpatory testimony. 107 S. Ct. at 2707, n.4. This Court expressed "no opinion" concerning the exclusion of evidence offered by witnesses other than defendant. *Id.* at 2712, n.15. As a result, at least one court has distinguished *Rock* when defendant merely sought to use polygraph evidence to corroborate his credibility. In the remarkably similar case of *State v. Ahlfinger*, 50 Wash. App. 466, 749 P.2d 190 (1988), the court enforced a per se exclusionary rule for unstipulated polygraph tests notwithstanding defendant's offer of proof concerning the reliability of his particular test. Noting that "[t]he rule did not prevent Ahlfinger from taking the stand to deny his guilt and fully present his version of

the facts", the court rejected defendant's due process and sixth amendment claims. 749 P.2d at 194. *Accord, State v. Coe*, 109 Wash. 2d 832, 750 P.2d 208 (1988) (en banc) (enforcing a state per se rule for hypnotically refreshed testimony despite *Rock*). Contrary to her suggestion in the instant case (Pet. 14), Barbara Boyle was not denied an opportunity to testify. After the trial court denied her pre-trial request to admit this evidence to corroborate her credibility as a witness, counsel made a deliberate, tactical decision to forego her testimony. (Pet. 8).

In this connection, respondent also submits that petitioner was not denied her constitutional right to present "her version of the facts." *Washington*, 388 U.S. at 19. Defendant Rock was unable to describe empirical facts when she was unable to relate the events of the shooting. 107 S. Ct. at 2712. Petitioner, in contrast, essentially offered polygraph evidence as a prior consistent statement designed to enhance her credibility. Petitioner sought to use the polygraph examiner as an expert character witness. Because petitioner at all times remained able to relate any pertinent, empirical facts known to her for her defense, the integrity of the trial's fact-finding function was not impaired. *Compare United States v. Nixon*, 418 U.S. 683, 709 (1974) (expressing concern lest the jury receive a "partial or speculative presentation of the facts"). Indeed, because petitioner was denied merely corroborative evidence in her case, the exclusion of this immaterial evidence did not violate any of her constitutional rights. *Compare Pennsylvania v. Ritchie*, ____ U.S. ____, 107 S. Ct. 989, 1001, 94 L. Ed. 2d 40 (1987); *Washington*, 388 U.S. at 16, and *Chambers*, 410 U.S. at 302.

Finally, the evidence excluded in the *Rock* proceedings bore persuasive indicia of reliability. *Rock*, 107 S. Ct. at 2714 (noting corroboration provided by a disinterested

firearms examiner and empirical fact). In each case in which this Court has condemned exclusion of exculpatory evidence, there was good reason to credit the trustworthy nature of the evidence. *See, e.g., Chambers*, 410 U.S. at 300 (noting corroboration of statements against penal interest). Because the polygraph technique can only test the extent to which an individual believes his answers, however, traditional means of corroboration will typically be absent for this type of evidence. *Cf. Vitello*, 381 N.E.2d at 597 (questioning the prosecutor's means of effective rebuttal of this evidence).

In summary, petitioner claims that application of the Illinois exclusionary rule will invariably deny a defendant's right to present exculpatory evidence. Boyle offered this polygraph evidence only to corroborate her credibility, however. In the context presented by the instant case, the Illinois rule represents a legitimate manifestation of the state's inherent rule-making authority. Because the state's interest in excluding unreliable evidence outweighed defendant's interest in corroboration, the application of the Illinois rule in this case must withstand constitutional challenge.

II.

BECAUSE DEFENSE COUNSEL FAILED TO LAY A FOUNDATION FOR ADMISSION OF THIS EVIDENCE, CERTIORARI REVIEW IS INAPPROPRIATE FOR THIS PARTICULAR CASE.

Petitioner contends that admission of polygraph evidence in all the sovereign states should be committed to the discretion of the trial court judge. Even under the standard advocated by petitioner, however, the test results in this case were still inadmissible. Petitioner, as proponent of the evidence, failed to make a preliminary showing of the

reliability of the results of her particular examination. Plenary review by this Court is decidedly inappropriate in this case as a result.

Petitioner stresses the extensive offer of proof which touched upon the reliability of the polygraph technique generally and the professional qualifications of her examiner, Dwight Whitlock. (Pet. 6-7, 14). When presented with a request to admit these test results in evidence, however, the trial court judge said he was "skeptical of the results of Barbara Boyle's polygraph." (R. 3671, 3674-75, 3671). Petitioner had never offered any information concerning the reliability of this particular test or the conditions under which it was performed. (R. 3671). As a result, the trial court judge said that, even if polygraph evidence were admissible as a matter of state law, he would exercise his discretion to exclude this particular evidence as unreliable. (R. 3655). When pressed for clarification by defense counsel, the following exchange occurred:

> THE COURT: You correctly stated. The Court feels it has no power to consider that result, and also as I said before, if I did have the power to consider it, my inclination without having had the benefit of the testimony concerning the charts, and having read the books that you submitted to me, *my tentative view of the test given is that it is not reliable.*
>
> MR. BAILEY: You mean polygraphs generally?
>
> THE COURT: No, no, no sir. I stand by my findings I made earlier. *I mean Mr. Whitlock's test. I am not persuaded at this threshold stage to afford it reliability.*

(R. 3674-75, emphasis supplied).

Indeed, as the appellate court observed, the State had no knowledge of the conditions under which this ex parte examination had been conducted. (Pet. App. A-19). As

noted earlier, ex parte tests tend to be particularly unreliable. Equally important, Mr. Whitlock apparently did not follow certain approved procedures for the pre-test interview. (R. 690). Petitioner was under the influence of an anxiety-reducing drug when this test was conducted. (R. 701). *See Baynes*, 88 Ill. 2d at 236 (noting ingestion of a sedative as one of the many factors which render a test unreliable). Finally, the examiner expressed some dissatisfaction with the relevant or crime-related test questions supplied by defense counsel. (R. 687-89, 693-95, 698-701, 701-706). As the prosecutor argued in the trial court, petitioner could have answered those questions truthfully in a manner consistent with the State's theory of her complicity in these murders. (R. 3652).

In sum, the State is always free to seek exclusion when the evidence offered in a particular case is unreliable. *Rock*, 107 S. Ct. at 2714. Because this evidence was clearly inadmissible even under the legal standard advocated by petitioner, a writ of certiorari should not issue in this case.

CONCLUSION

Because petitioner has not identified any issue worthy of plenary review, respondent respectfully urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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